not the only method of service and its justification is the convenience of the public. It is a method which is an alternative to any other method provided by the rules. Where a solicitor undertakes to accept service under O. IX r. 1 it must be obvious that the defendant company in question must have so instructed him and that once the company has been so served section 305 ceases to operate. In fact I would go further to hold that an undertaking to accept service under O. IX r. 1 renders section 305 inoperative as from the date of that undertaking.

As Mr. Chelliah undertook to accept service on behalf of the company, no doubt on Philip Lau's instructions, the plaintiff's solicitor sent the writ to him. If he had not so intimated, the plaintiff could have posted the writ to Philip Lau and been completely covered by section 305.

It is to be observed, however, that the notice of service on page 3 of the writ states that the writ "is served on the company by addressing it to Philip Lau . . . ". This does not appear to be strictly correct and I can only assume that after the writ had been prepared, Mr. Chelliah's letter undertaking to accept service arrived. Whatever means was adopted to effect service complaint is not being made that the service is bad or that the parties are not properly before the court.

I mention this merely because the reference (by implication) in the notice of service to the provisions of section 305 may well have been responsible for the action taken by Mr. Chelliah to challenge the regularity of the writ.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Ironside & De Souza; Drew & Napier.*

MAJUMDER v. ATTORNEY-GENERAL OF SARAWAK

[O.C.J. (Lee Hun Hoe J.) September 10, 1965]

[Kuching — Civil Suit No. C/122/63]

Crown — Servant of Crown — Whether designated officer — Whether entitled to inducement pay.

Declaration — Claim for — Discretion of court — Designated officer — Inducement pay — Prerogative of Governor-in-Council — Overseas Service Ordinance, 1961 — General Orders.

The plaintiff, a doctor, after serving in various capacities in India went to England in 1955 for post graduate studies. While he was working in England (after completion of his studies) he applied for the post of medical officer in Sarawak. He was interviewed in England but his letter of provisional appointment was sent to him at an address in Calcutta which he had provided. The plaintiff received his formal letter of appointment on his arrival in Sarawak on December 6, 1958 and he was confirmed in his appointment on December 4, 1961. He was however not in receipt of inducement pay like other expatriate officers. Sometime in 1963 all expatriate officers except the plaintiff were informed of their future in the service and the benefit they would get under the Malaysia Retirement Scheme. The plaintiff thereupon brought an action against the Government of Sarawak by making the Attorney-General of Sarawak the nominal defendant claiming three declarations: (1) that he is a member of Her Majesty's Overseas Civil Service; (2) that he is a "designated officer" within the meaning of the Schedule to the Overseas Service Ordinance; (3) that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a member of Her Majesty's Overseas Civil Service.

At the trial it was admitted on behalf of the defendant that the plaintiff was a member of Her Majesty's Overseas Civil Service that all such members except the plaintiff was in receipt of inducement pay and that the plaintiff was an "entitled officer" for the purposes of the Compensation and Retiring Benefits Order-in-Council, 1963.

Held: (1) as the defendant has conceded that the plaintiff is a member of Her Majesty's Overseas Civil Service there was no reason to make the first declaration as the plaintiff's right was no more in dispute;

(2) the plaintiff was entitled to a declaration that he was a "designated officer" within the meaning of the Schedule to the Overseas Service Ordinance, 1961;

(3) as to the question whether a civil servant is entitled to inducement pay or not is entirely a prerogative for the Governor-in-Council as laid down in the General Orders, it would be contrary to public policy for the court to make such a declaration resulting in the unnecessary interference of a prerogative right.

Cases referred to:—

(1) *Barraclough* v. *Brown* [1897] A.C. 615, 624.

(2) *Russian Commercial & Industrial Bank* v. *British Bank of Foreign Trade* [1921] 2 A.C. 438, 448.

(3) *Ruslip-Northwood Urban District Council* v. *Lee* (1935), 143 L.T. 208, 214.

(4) *Vine* v. *National Dock Labour Board* [1956] 3 All E.R. 944.

(5) *Wigg & Anor.* v. *Attorney-General for Irish Free State* [1927] A.C. 674.

(6) *Right of Passage over Indian Territory Case (Portugal* v. *India)* I.C.J. Rep. (1957), 125, 142.

(7) *Re Dulles Settlement Trusts* [1951] 2 All E.R. 60, 70, 71.

(8) *Jacobs* v. *Batavia* [1924] 2 Ch. 324.

(9) *McClelland* v. *Ireland Health Board* [1957] 2 All E.R. 129.

(10) *Dunn* v. *The Queen* [1896] 1 Q.B. 116.

(11) *Shenton* v. *Smith* [1895] A.C. 229.

(12) *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482.

(13) *Jopp* v. *Wood* (1865), 34 L.J. Ch. 212, 218.

(14) *Gillis* v. *Gillis* (1814), Ir.R. 8 Eq. 597.

(15) *R.* v. *North Curry (Inhabitants)* (1825), 4 B. & C. at p. 959.

(16) *Curtis* v. *Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805, 807.

(17) *L'Estrange* v. *F. Graucob Ltd.* [1934] 2 K.B. 394, 403.

(18) *Memudu Lagunju* v. *Oblubadan in Council* [1952] A.C. 387.

(19) *Healey* v. *Minister for Health* [1955] 1 Q.B. 221.

(20) *Roesin* v. *Attorney-General* (1918), 34 T.L.R. 417.

(21) *British Association of Glass Bottle Manufacturers Ltd.* v. *Forster & Sons Ltd.* (1917), 86 L.J. Ch. 489, 494 — 495.

CIVIL SUIT.

T. O. Thomas for the plaintiff.

D. M. Goodbody (Crown Counsel) for the defendant.

Cur. Adv. Vult.

Lee Hun Hoe J.: In this case plaintiff brought an action against the Government of Sarawak by making the Attorney-General of Sarawak nominal defendant, claiming three declarations. They are as follows:—

"I. Declaration of court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December, 1958.

II. Declaration of court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961).

III. Declaration of court that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a member of Her Majesty's Overseas Civil Service."

The statement of claim was filed on 27th August, 1963. Defence and reply were filed on 2nd December, 1963 and 9th December, 1963 respectively. Certain documents were submitted as agreed bundle of documents.

Plaintiff was born on 1st January, 1926 in Bengal, India at Rangpur which is now part of Pakistan. He obtained his M.B.B.S. from Calcutta University in 1948. He then joined the R.G. Kar Medical College Hospital, Calcutta. From May 1950 to August, 1955 he served as a medical officer in the Indian Army Medical Corps with the rank of Captain. Soon after leaving the army he went to England in the later part of 1955 for post graduate medical studies. He obtained the following additional professional qualifications:—

D.P.H., D.I.H., and D.T.M. & H.

In March 1958 he served as a senior house officer in the General Hospital, Rochford, Essex. While he was working in this hospital he saw an advertisement in the *British Medical Journal* for a post of medical officer in Sarawak. Subsequently he sent in his application for the post. He was interviewd by the Medical Appointments Committee on 27th March 1958. Following this interview he wrote to the Director of Recruitment Colonial Office requesting that further communication be sent to him at an address in Calcutta where he would be going. The address given was that of his father-in-law with whom plaintiff's wife had been staying while plaintiff was in England.

By a letter dated 2nd May, 1958 plaintiff was informed that he had been provisionally selected for appointment as medical officer, Sarawak and that a formal letter of appointment would soon be sent to him. Eventually a letter dated 12th June, 1958 was sent to him offering him an appointment on probation for three years as medical officer, Sarawak at a salary of $1,155 a month in view of his professional experience and qualifications in what was then Division II (now Division I) Salary Scale A for medical officers. This salary scale is $870/930 x 15 — 1050/1085 x 35 — 1260/BAR/1300 x 40 — 1420. He was informed that in addition to his basic salary, allowances would be payable at the rates shown in the memorandum which was enclosed in the letter.

Paragraphs 1 to 8 of the memorandum read:—

"1. *Appointment*

The probationary period is three years from the date of arrival in Sarawak. On completion of this period an officer is eligible, provided that he has passed the examinations prescribed by local regulations, for confirmation in his appointment.

2. Half salary will be payable for the period of the voyage from the country of engagement to Sarawak on first appointment. For purposes of exchange with sterling one Sarawak dollar equals 2s. 4d.

3. *Allowances*

(i) *Education Allowance* Married officers' dependent children may receive an allowance in respect of the expense to them of educating their children, up to a maximum of two in number, outside the colony. The allowance would be payable at $100 a month for children between the ages of 5 and 17 years.

(ii) *Child Allowance* Married officers with one or more dependent children will receive an allowance at the rate of 7½% of salary with a maximum of $100 a month. The allowance will be payable in respect of a child or children under the age of 16 years only; provided that if the child or children are between 17 years and 21 years, the allowance shall still be payable for as long as the child is receiving full time education.

(iii) *Outfit Allowance* An allowance of £60 is payable to officers on first appointment as a means of assistance towards the purchase of essential tropical kit.

4. *General conditions of service*

An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable. A copy of the current edition of the Colonial Regulations (Part I) is attached. The officer will be required to serve anywhere in Sarawak or in the State or Brunei.

5. *Security*

The holders of certain appointments are required to furnish security for the faithful discharge of their duties. Normally all premiums payable in respect of such security may be deducted from an officer's salary.

6. *Pensions*

Pensions are granted in accordance with provisions of the Sarawak pensions legislation. The rate of pension in Sarawak is 1/600th either of pensionable emoluments on retirement, or of pensionable emoluments averaged over the last three years of service for each completed month of pensionable service. Pensions are payable subject to the completion of 10 years' continuous public service *and* to retirement on the grounds of age or ill-health. Pension may be converted, subject to option exercisable on or before the date of retirement, into a reduced pension (3/4 of full pension) *plus* lump sum (12½ x ¼ of full pension). Officers may retire or be called upon to retire at any time after attaining the age of 45 subject, except where officers submitting an application to retire have attained the age of 50, to six months' notice.

7. *Widows' and Orphans' Pensions*

In accordance with the provisions of the Sarawak Widows' and Orphans' Pensions Legislation, male officers under the age of 54 and whether married or single are required to contribute to the Sarawak Widows' and Orphans' Pensions Fund. The rate of contribution is 5% of salary plus inducement pay, subject to a maximum of $50 a month.

8. *Vacation Leave*

Officers will normally be required to serve, subject to the exigencies of the service, a tour of duty of four years. Leave is granted at the rate of 34 days a year.

In addition to the leave thus earned, voyage leave is granted for the period of the voyage by an approved direct route to and from the officer's country of domicile."

The letter dated 12th June, 1958 was sent to plaintiff through the Deputy High Commissioner in Calcutta. Plaintiff replied on 10th October 1958 accepting the offer under the terms and conditions set out in the letter dated 12th June, 1958 and in the memorandum. Thus plaintiff came to Sarawak where he received from the Acting Chief Secretary a formal letter of appointment dated 6th December, 1958. This letter reads:—

"Sir,

I am directed to inform you that His Excellency the Governor has been pleased to appoint you to be a medical officer in Sarawak in Her Majesty's Overseas Civil Service with effect from 1st December, 1958 on the conditions embodied in the Secretary of State's letter to you reference BCD/P-13847 dated 12th June, 1958.

2. The appointment is on the permanent and pensionable establishment and the salary of the post is in Division II, Scale A $870; $930 x 30 — 1050 x 35 — 1260/BAR/ 1300 x 40 — 1420 a month. Child Allowance is payable at the rates laid down in Secretariat Circular No. 10/ 1956; vacation leave, local leave, leave passages, travelling allowances and other privileges will be granted in accordance with the Sarawak General Orders.

3. You will enter the salary scale at $1,155 a month, and your incremental date would be 4th December.

4. I have to request that if you accept the appointment you send an undertaking to this office in the form attached hereto together with a declaration of secrecy in accordance with G.O. 570.

I am, Sir,
Your obedient servant,
(Sgd.) Lo Suan Hian
f. Acting Chief Secretary."

He was confirmed in his appointment as a medical officer with effect from 4th December, 1961. (See the Sarawak *Government Gazette* Part V dated 12th January, 1962, Notification No. 22).

Plaintiff stated that until August, 1961, he was all the time under the impression that his salary included inducement pay. When he realised that it was not so he submitted a petition dated 19th August, 1961, to the Governor-in-Council asking for inducement pay retrospectively from the date of his first appointment. The petition appeared to have been sent to the Secretary of State who agreed with the Government of Sarawak that plaintiff was not entitled to inducement pay. Thus the Chief Secretary replied to the petition that plaintiff's claim for inducement pay could not be admitted. There is no clear evidence whether this petition had gone to the Governor-in-Council as it should have been for under the Sarawak Government General Orders the decision of the Governor-in-Council is deemed to be final.

Plaintiff's appointment as a medical officer in Sarawak was published in the *British Medical Journal* and in the *London Gazette*. It was admitted that the material for publication was supplied by the Colonial Office. Then there is the formal letter of appointment dated 6th December, 1958 written by the Acting Chief Secretary at the direction of His Excellency the last Colonial Governor which clearly stated that plaintiff was appointed a medical officer in Sarawak in Her Majesty's Overseas Civil Service (hereinafter referred to as H.M.O.C.S.). That the plaintiff would get the said formal letter of appointment on his arrival in Sarawak was clearly indicated in the letter dated 12th June, 1958. In view of all the above it is not surprising for plaintiff to consider himself a member of H.M.O.C.S.

With the approach of the historical and constitutional changes in the shape of Malaysia plaintiff was not unnaturally concerned with his position in the service. The reason appears to be that except plaintiff all expatriate officers who were members of H.M.O.C.S. and some not members of H.M.O.C.S. but in receipt of inducement pay were informed of their future in the service and the benefits they would get under the Malaysia Retirement Scheme as a result of the publication of the Report of the Inter-Governmental Committee, 1962, as Sessional Paper No. 1 of 1963. So he wrote a letter dated 17th July, 1963 to the Chief Secretary seeking clarification as to his position as member of H.M.O.C.S. under the said Scheme. The reply dated 17th August, 1963 was that he was not a member of H.M.O.C.S. and that he did not qualify as an "entitled officer".

I am happy to note that since the filing of

the statement of claim and as a result of correspondence between the parties defendant has now conceded that plaintiff is a member of H.M.O.C.S. as from 1st December, 1958 and accordingly has become an "entitled officer". Since this admission certain sum of money was paid into plaintiff's bank as compensation and defendant wrote to plaintiff a letter dated 15th January, 1964 informing him that his enrolment as member of H.M.O.C.S. had been treated as having effect for purposes of the Compensation and Retiring Benefits Order-in-Council, 1963 on the operative date, namely, 30th August, 1963, i.e. before the event of Malaysia.

First I would like to say that in the light of the evidence as far as membership in H.M.O.C.S. is concerned plaintiff had been shabbily treated by the colonial administration. It is a sad spectacle for the administration to inform a civil servant at the time of his appointment that he was a member of H.M.O.C.S. and to turn round years later to say that he was not such a member.

On the other hand I find it hard to believe that until August, 1961 plaintiff was under the impression that his salary included inducement pay. The monthly salary slip would have indicated this to him. Further if he was paid an inclusive salary, as was suggested, then one would not expect him to be entitled to other benefits such as education allowance and child's allowance.

At the commencement of the hearing the parties agreed to certain facts. They are as follows:—

1. The defendant concedes that the plaintiff has been a member of Her Majesty's Overseas Civil Service since 1st December, 1958. That is to say, the defendant does not oppose the plaintiff's claim contained in paragraph 1 of the statement of claim for a declaration of court to this effect.

2. The defendant admits that the appointment of the plaintiff as a medical officer in Sarawak in Her Majesty's Overseas Civil Service was published in the *British Medical Journal* and also in the *London Gazette.*

3. The defendant further admits that since December 1958 all members of Her Majesty's Overseas Civil Service on the permanent and pensionable establishment of the Government of Sarawak have been in receipt of inducement (or expatriation pay), EXCEPT the plaintiff.

4. The defendant also admits that the plaintiff is an "entitled officer" for the purposes of the Compensation and Retiring Benefits Order-in-Council, 1963.

5. It has further been admitted by the defendant that in the current Sarawak Government Staff List the plaintiff is shown as an induced officer."

Counsel for plaintiff has stressed on the fact that plaintiff was stated to be an "induced officer" in the Sarawak Government Staff List, 1964 (Part I). This publication may be a public document but the cover clearly indicated that the publication is meant for "official use only". Its accuracy cannot be taken for granted. On the 3rd page of the publication can be found following words:—

"It is requested that any errors or omissions be brought to the notice of—

The State Secretary,
The Chief Minister's Office,
Kuching."

I do not regard the publication as conclusive evidence of anything. The fact that the plaintiff is shown to be an "induced officer" by a corrigendum does not necessarily mean that he is such as it is an admitted fact that plaintiff has never received any inducement pay since his appointment. Before the corrigendum plaintiff was shown as a "designated officer". Mr. Williams, the State Establishment Officer, informed the court that the corrigendum was also wrong. What conclusion can one draw from this? Someone had made a mistake or the corrigendum was published without going through proper channels.

Before Malaysia procedural rules in civil matters were governed by the Sarawak, North Borneo and Brunei High Court (Civil Procedure) Rules. Under rule 171 it was provided that

"Where no provision for procedure is made or no appropriate form is provided by these or any other rules, the procedure and practice and forms for the time being in force or used in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted."

Since Malaysia the Rules of the Supreme Court, 1957 with slight modifications are made applicable to the High Court in Borneo. Order 25 rule 5 is in all respect similar to the English rules similarly numbered and reads:—

"No action or proceedings shall be opened to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not."

The declaratory jurisdiction has sometimes been represented as virtually unlimited. This is not so. Lord Davey in *Barraclough* v. *Brown,*[1] speaking of Order 25 rule 5, said:—

"It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only, and must be so construed."

I do not think the court can be compelled to entertain any and every action for a declaration. It cannot be said that a claim for any declaration whatsoever it may be is a good ground of action. The courts are not prepared to assume the power of declaring upon theoretical issues. This was emphasised by Lord Dunedin in *Russian Commercial and Industrial Bank* v. *British Bank of Foreign Trade* [2] in these words:—

"The question must be real and not a theoretical question; the person raising it must have a real interest

to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

Lord Dunedin was speaking of Scottish Law. However the same principle was applied to English Law (*Ruslip-Northwood Urban District Council* v. *Lee* [3]). The statement was quoted with approval by Viscount Kilmuir L.C. in *Vine* v. *National Dock Labour Board.* [4]

Now that the defendant has conceded that the plaintiff is a member of H.M.O.C.S. since 1st December, 1958, there is no reason for me to make the first declaration as plaintiff's right is not in dispute any more. The court will not decide a point of law which has since become academic even though defendant does not oppose to the making of the declaration. Accordingly, in exercise of my discretion, I decline to make the first declaration.

I now come to the second declaration that plaintiff is eligible for designation as a "designated officer". Defendant suggested that the term "expatriate officer" should be interpreted in accordance with the provisions of paragraph 192 of the Sarawak Government General Orders. I do not agree that that term should be given such a narrow interpretation. The term "expatriate officer" to my mind simply means an officer recruited from a country outside Sarawak (now perhaps Malaysia). In fact paragraph (1) of the latest edition of the Sarawak Government General Orders defines "expatriate officer" to mean an officer recruited from a country outside Borneo. At any rate defendant did not seriously dispute that plaintiff is an "expatriate officer".

As a result of an agreement between the British Government and the Government of Sarawak, the Overseas Service Ordinance, 1961, was enacted by the Legislature of Sarawak to take effect as from 1st April, 1961. This Ordinance thus became part of the Laws of Sarawak. This is an Ordinance to ratify and confirm the Overseas Service (Sarawak) Agreement, 1961 and to provide for matters connected therewith. The event of Malaysia did not cause any change. In fact by article 81 of the Malaysia Act the pension rights of members of the public service in Sarawak are preserved. In *Wigg & Another* v. *Attorney-General for the Irish Free State* [5] a treaty was entered into between Great Britain and Ireland upon the establishment of the Irish Free State. By article 10 of the treaty the Irish Free State agreed to pay fair compensation in terms not less favourable than those accorded by the Government of Ireland Act, 1920, to civil servants who should retire in consequence of the change of Government effected under the treaty. Act I of 1922, of the legislature of the Irish Free State, gave the treaty the force of law, and by article 78 of the Constitution which it enacted transferred civil servants were to have the benefit of article 10. The Judicial Committee of the Privy Council held that Act I of 1922 of the Irish Free State gave to the appellants a legal right to the benefit of article 10 of the treaty enforceable in the courts of that State.

Defendant argued that subject to the consent of the United Kingdom Treasury designation is a matter wholly within the competence and discretion of one of Her Majesty's principal Secretaries of State and that designation under the said agreement is not justiciable in any proceedings in this court. With regard to the first declaration defendant took a similar line but had since conceded after communicating with the "true clients in London".

Various authorities on international law were referred to me. I do not think it is necessary for me to go into all of them. The regularity of the seising of the matter by the court is not in dispute. Perhaps I should refer to the recent judgment of the International Court of Justice in the *Right of Passage over Indian Territory case* (*Portugal* v. *India* [6]) which may be of some assistance and in which the court said:—

> "It is a rule of law generally accepted, as well as acted upon in the past by the court, that, once the court has been validly seised of a dispute, unilateral action by the respondent State in terminating its declaration, in whole or in part, cannot divest the court of jurisdiction. In the *Nottebolm* case the court gave expression to that principle in the following words:
>
> 'A extrinsic fact such as the subsequent lapse of declaration by reason of the expiry of the period or by denunciation, cannot deprive the court of the jurisdiction already established.' (I.C.J. Reports, 1953, 123)."

The three declarations sought by plaintiff appear to be closely linked. If I may say so defendant not only submitted to jurisdiction but chose to fight the issues on merits. Lord Evershed then M.R., while discussing about jurisdiction, in *Re Dulles Settlement Trusts* [7] said:—

> "It is, of course plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him, and he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits."

The said agreement is set out in a schedule and forms part of the Ordinance. The term "designated officer" is defined to mean an officer designated as such by a Secretary of State who is —

> "(i) an expatriate officer in the service of the Government of Sarawak on or after the appointed day and
>
> (ii) who —
>
> (a) is a member of Her Majesty's Overseas Civil Service; or

(b) was selected for appointment by or with the approval of a Secretary of State, or was recruited by the Crown Agents for Overseas Governments and Administrations; or

(c) was otherwise recruited to a post for which a normal channel of recruitment is either the Colonial Office or the Crown Agents for Oversea Governments and Administrations and whose appointment for the purpose of this agreement is approved by a Secretary of State;"

I may mention that the said agreement was the result of Command Paper No. 1193 entitled "Service with Overseas Governments" presented to the British Parliament by the Secretary of State for the Colonies by Command of Her Majesty in 1960. By a circular letter dated 10th November, 1961 signed by the Chief Secretary, Sarawak, all designated officers of the Government of Sarawak under Her Majesty's Overseas Service Aid Scheme were informed of the intentions of Her Majesty's Government as published in the said Command Paper.

The first part of paragraph 9 under the heading of "The new arrangements" at page 6 of the said Command Paper reads:—

"H.M. Government are therefore ready to enter into agreements with employing Governments in order to assist in resolving the problems which beset them, and the officers concerned, in relation to the employment of expatriate staff. The arrangements envisaged by H.M. Government will include pensionable expatriate officers who are or become members of Her Majesty's Overseas Civil Service and expatriate contract officers who were or are appointed in the same way as members of Her Majesty's Overseas Civil Service (see Appendix A). The categories of officers brought within the scheme would thus not exclude persons engaged in countries other than the United Kingdom itself, and the exact categories to be included would be defined in the agreements to be concluded with individual overseas Governments."

As I see it the refusal to accord him this designation was because the colonial administration originally strenuously denied that plaintiff was a member of H.M.O.C.S. despite convincing evidence to indicate otherwise. Had the colonial administration taken the trouble in the earlier stage to seek legal advice inconvenience of this nature would not have been caused and plaintiff would have been relieved of much anxiety. The said Command Paper clearly indicated to whom the benefits would accrue when an agreement was to be concluded. In my opinion the Secretary of State was badly advised by the colonial administration. I am satisfied that plaintiff is an "expatriate officer". It has now been conceded and is therefore clear as a pikestaff that plaintiff is a member of H.M.O.C.S. Further he was selected for appointment by or with the approval of the Secretary of State. In my judgment, having regards to the above, plaintiff is surely eligible for designation as a "designated officer" according to the true construction of the said Ordinance. Therefore I hold that plaintiff is entitled to the second declaration.

Finally I come to the third declaration that it would be unlawful to refuse plaintiff "inducement pay". The use of the word "unlawful" is inappropriate. In effect he is claiming to be entitled to additional pension. Normally a civil servant may expect to get a pension when he reaches the age of compulsory retirement. But there is no absolute right to a pension under the Pension Ordinance (Cap. 89). A better choice of word would seem to be "unreasonable".

The terms "expatriation pay" and "inducement pay" are synonymous. A perusal of the few editions of Sarawak Government General Orders would show that the latter term is of much more recent creation. The terms "expatriate officer" and "induced officer" are also synonymous. Except plaintiff all other members of H.M.O.C.S. were in receipt of "inducement pay". Thus Mr. Murthy, an Indian, an Assistant Conservator of Forests, who is not a member of H.M.O.C.S. is in receipt of "inducement pay". There is no difficulty in his case as he was appointed in the United Kingdom. Presumably he was offered his appointment while he was in Edinburgh and accepted the offer while he was still there. At any rate at the time paragraph 192 of the Sarawak Government General Orders (hereinafter referred to as paragraph 192) had not been amended yet. Before the amendment paragraph 192 reads:—

"192. (i) An officer of the Senior Service shall be eligible for expatriation pay if:—

(a) on the occasion of his first appointment he was habitually resident in a country other than Borneo, the Federation of Malaya, Singapore, Indonesia or the Phillippines, and

(b) he has his principal family and social ties and general background in any such country, and

(c) his appointment to the Sarawak Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work. Provided that an officer, who on the first occasion of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his calling, shall be deemed to have been recruited from an overseas country."

After the amendment and as from 1st August, 1957 paragraph 192 reads:—

"192. (i) An officer in Division I, II or III shall be eligible for inducement pay if:—

(a) on the occasion of his first appointment he was habitually resident in a country other than Borneo, Burma, Ceylon, China, the Federation of Malaya, Hong Kong, India, Indonesia, Pakistan, the Phillippines, Siam or Singapore, and

(b) he has his principal family and social ties and general background in any such country, and

(c) his appointment to the Sarawak Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work. Provided that an officer, who on the first occasion

of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his profession or calling, shall be deemed to have been recruited from an overseas country."

I personally knew of three police officers recruited from Hong Kong in the Sarawak Government Service two of whom were in receipt of "inducement pay" while one was not. According to Mr. Williams, the State Establishment Officer, plaintiff was not paid "inducement pay" because of the amendment to paragraph 192. "Inducement pay" was paid by the Government of Sarawak until 1st April, 1961 when the British Government assumed responsibility for such pay.

Counsel for plaintiff referred to *Jacobs* v. *Batavia* [8] and *McClelland* v. *Ireland Health Board* [9] on the question of terms of contract. I do not think they are of great assistance to me. They are not concerned with contract of service of the Crown and the paramount right of the Crown. It is well established that a contract of service with the Crown is terminable at the pleasure of the Crown and no claim for wrongful dismissal will lie in respect thereof (*Dunn* v. *The Queen* [10]; *Shenton* v. *Smith* [11]; *Terrell* v. *Secretary of State for the Colonies* [12]). In actual fact once he is confirmed in his appointment he is secured in his employment until he reaches retiring age, apart, of course, from misconduct or complete inefficiency.

Counsel for plaintiff also referred to paragraph 7 of the said memorandum relating to the rate of contribution to the Sarawak Widow's and Orphan's Pension Fund at 5% of salary plus inducement pay, subject to maximum of $50 a month. Paragraph 7 in no way enhances the plaintiff's claim. Whether he is in receipt of inducement pay or not it makes no difference to his contribution since his basic salary was above $1,000 his contribution would be at the maximum rate.

The term "domicile" is often used in a lax sense, meaning no more than is meant by the term "residence". It is fallacious to think that the terms "domicile" and "residence" are synonymous. The law has in several instances attributed to a person a "domicile" in a country where in reality he has not, and perhaps never had, a home. Some writers used the term "residence" as synonymous with the word "home" i.e. as including both "habitual physical presence" and "intention to reside" (*animus manendi*). "Residence" has in many instances been employed by judges and others to denote a person's habitual physical presence in a place or country which may or may not be his home (see *Jopp* v. *Wood* [13]; *Gillis* v. *Gillis* [14]). The word "habitual", in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period whatever that period may be (whether ten years or ten days). "Residence" connotes the idea of home or at least of habitation, and need not necessarily be permanent or exclusive*. The word denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep (*R.* v. *North Curry* (*inhabitants*) [15]).

It is true that plaintiff was in England when he saw the advertisement and applied for the post of medical officer in Sarawak. He was interviewed in England. However the offer of appointment was made to him while he was in India and he accepted the offer while in India. Although I sympathise with plaintiff I must say that the advertisement was no more than an invitation to a treat. It created no binding offer. No doubt the mention of expatriation pay in the advertisement tended to attract likely candidates. I have no doubt that the advertisement was in the main meant for candidates residing in the British Isles. Nevertheless it could not prevent persons residing elsewhere who came across the advertisement from applying for the post.

As I understand the term "resident" I would say his residence was in India when the offer was made and accepted. He was therefore caught by a technicality which disentitled him "inducement pay" by virtue of paragraph 192. It was this technicality which the colonial administration had taken advantage of from the very beginning. I have no doubt if plaintiff proceeded to India after his acceptance of the offer the colonial administration would find it difficult to refuse him "inducement pay".

Plaintiff had accepted the offer as set out in the letter dated 12th June, 1958 and the memorandum which to my mind set out his salary and allowances clearly. Clause 4 of the memorandum indicated clearly to plaintiff that his appointment was "subject to the General Orders of the Government in which he is serving". General Orders were originally meant to benefit to a very large extent expatriate officers recruited from abroad. It is not uncommon that as soon as the benefits accrued to others not originally meant to be included the General Orders would be amended accordingly.

Counsel for plaintiff quite properly pointed out that the Secretary of State must have accepted plaintiff as an officer eligible for inducement pay when he granted him an outfit allowance of £60 on his first appointment. Paragraph 47(i) of the Sarawak Government General Orders reads:—

"An outfit allowance of £60 shall be payable to an officer who is eligible for inducement pay under General Order 192 engaged outside Sarawak and

* *Jowitt*, Dictionary of English Law.

(a) who is on first appointment; or

(b) from whom the Chief Secretary approves such an allowance."

I am satisfied in the appointment of plaintiff there had been considerable muddle on the part of the colonial administration. If plaintiff is entitled to "inducement pay" his pension would be increased on his retirement because "inducement pay" is pensionable. I regard the payment of outfit allowance to plaintiff as very strong indication that the Secretary of State was under the impression that plaintiff was eligible to "inducement pay".

Plaintiff argued that he was not aware of the provisions of paragraph 192. Somervell L.J. at page 807 in *Curtis* v. *Chemical Cleaning and Dyeing Co.*[16] referred to the Statement of Scrutton L.J. in *L'Estrange* v. *F. Graucob Ltd.*[17] which reads:—

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

In the same case [16] Denning L.J. at page 808 made this observation:—

"In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly it is a fraudulent misrepresentation; if it is created unwittingly, it is innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption."

It seems to me that by paying plaintiff an outfit allowance on his first appointment an impression was created that plaintiff was eligible to "inducement pay". It might have been done unwittingly but to my mind was clearly a misrepresentation. It is no use turning round to say that this payment was made as a matter of grace. I will not go into the question of damages and recission arising out of misrepresentation as it would not serve any useful purpose here. In my view when the impression was given that a person was eligible to something the party giving out that impression should not be allowed to turn round later to say that he was after all not so eligible. Defendant cannot in one breath say that although the Sarawak Government General Orders apply to plaintiff, in particular paragraph 192 but not paragraph 47 of the said General Orders. In the same way plaintiff cannot say that he had no knowledge of paragraph 192 and at the same time invoked the provisions of paragraph 47.

It is true that "inducement pay" was not specifically mentioned in the letter dated 12th June, 1958 and the memorandum because as the State Establishment Officer had indicated that until 1st April 1961 such payment was the concern of the Government of Sarawak. It was presumably for this reason that plaintiff's petition was forwarded to the Secretary of State. I consider that the colonial administration was wrong to forward the petition to the Secretary of State because the question whether a civil servant is entitled to "inducement pay" or not is entirely a prerogative for the Governor-in-Council as laid down by paragraph 192 of the said General Orders. Every act which the executive Government can lawfully do without the authority of the Act of Parliament is done by virtue of this prerogative(‡). Where the prerogative power exists the question whether or not it should be exercised and how it should be exercised are matters beyond the control of the courts.

My attention has also been drawn to the fact that at present there are top level discussions going on in connection with plaintiff's position between the Malaysian and British Governments.

In considering whether a case is one in which it is permissible to grant a declaration, and, if so, whether in the particular circumstances a declaration ought to be granted, the courts exercise a very wide discretion. Declarations will be refused, e.g. where the matter is placed within the exclusive jurisdiction of another tribunal (*Memudu Lagunju* v. *Oblubadan in Council* [18]; *Healey* v. *Minister of Health* [19]); where the proceedings are an abuse of the process of the court (*Roesin* v. *Attorney-General* [20]); or where the proceedings would in any other respect be contrary to public policy. (See *British Association of Glass Bottle Manufacturers Ltd.* v. *Forster & Sons Ltd.*[21]).

In the circumstances, apart from commenting on certain undisputed facts, I consider that it would be improper for me to form any definite opinion in respect of the third declaration. It may be that I have expressed sympathy for plaintiff. But it is not unusual for a judge to indicate his sympathy for a party and yet decide against that party. In my opinion it would be contrary to public policy for the court to make such a declaration resulting the unnecessary interference of a prerogative right. The prerogative power of deciding whether plaintiff is entitled to "inducement pay" or not rests with the Governor-in-Council. Accordingly in the exercise of my discretion I decline to make the third declaration.

Order accordingly.

‡ See *Dicey's* Law of the Constitution, 10th Edn., p. 425.